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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,

vs.

WYMAN PARTRIDGE & COMPANY.

Petition of Wyman Partridge & Company For a Rehearing.

FRANK J. ALBUS,
Washington, D. C.,
Counsel for Wyman Partridge & Company.

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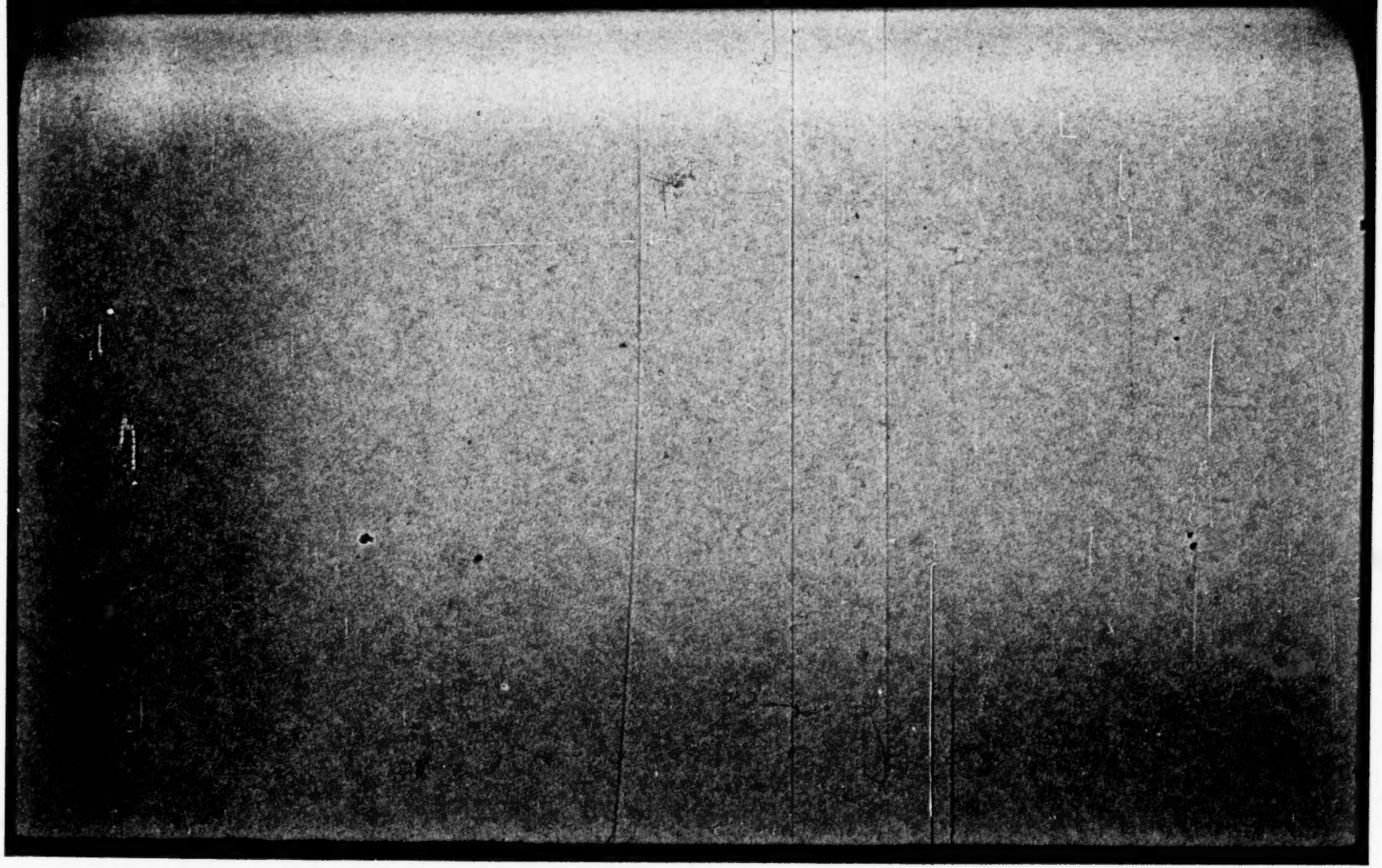

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Comes now, Wyman Partridge & Company, and presents this, its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

The facts in the case of this petitioner are different from the facts in any other statute of limitations case that was decided by this Court under date of January 26, 1931. The collection was made from the petitioner under threat of distraint after Section 1106(a) of the Revenue Act of 1926 had completely extinguished the liability. No bond was filed by the petitioner to secure the payment of any amount after the statutory period for collection had expired and no collateral security of any kind was posted with the Collector of Internal Revenue or anyone else guaranteeing payment. These facts cause the case of this petitioner to be separate and distinct in itself and different from any other statute of limitations case that has been before this Court.

The opinion and judgment of the Court rendered on January 26, 1931, is in conflict with the decision of the Court in the case of William Danzer and Company, Inc., *vs.* Gulf

& Ship Island Railway Company, 268 U. S. 633. In that case this Court held an Act of Congress to be unconstitutional which attempted to revive a liability after that liability had been extinguished by the expiration of the statutory period of limitations. In that case this Court said:

> "On the expiration of the two-year period it was as if liability had never existed."

For the same reason when Section 1106(a) of the Revenue Act of 1926 extinguished the liability of this petitioner prior to the time the Collector of Internal Revenue enforced collection it was as if the liability had never existed. Section 611 of the Revenue Act of 1928 certainly did not create, nor did it attempt to create, any new liability. Consequently, if there was no liability when the tax was collected and no new liability was created by the Revenue Act of 1928, then there is no liability now and the Government is retaining the property of the petitioner simply because it has it. This Court, in the Danzer case, supra, held the law of Congress to be unconstitutional and it seems that the same conclusion of law should be applied in the case of this petitioner.

The opinion of the Court in the case of this petitioner contains a sentence reading as follows:

> "That Section [Section 1106(a) of the Revenue Act of 1926] was repealed as of the date of its passage by Section 612 of the Revenue Act of 1928."

The opinion and judgment of the Court holding that Section 1106(a) of the Revenue Act of 1926 could be repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 and that such repeal could effect rights which accrued while Section 1106(a) of the Revenue Act of 1926 was in force, is in conflict with the decisions of this Court in the cases of Memphis *vs.* United States, 97 U. S. 283; Lincoln *vs.* United States, 202 U. S. 485; Fletcher *vs.* Peck, 10 U. S. 75, and Frost *vs.* Corporation Commissioner, 278 U. S. 515.

In the Memphis case this Court said:

> "We do not deny that it is competent for a legislature to repeal an act which when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it."

Chief Justice Marshall in Fletcher *vs.* Peck, supra, said:

> "The principle asserted is that, one legislature is competent to repeal an act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature. The correctness of this principle so far as respects general legislation can never be controverted. But if an act be done under a law, a succeeding legislature can not undo it. The past can not be recalled by the most absolute power."

And Mr. Justice Sutherland in Frost *vs.* Corporation Commissioner, supra, said:

> "An existing statute can not be recalled or restricted by anything short of a constitutional enactment."

The opinion and judgment of the Court rendered under date of January 26, 1931, is in conflict with the above decisions of this Court.

The opinion of the Court states that Congress had constitutional authority under the circumstances set forth in Section 611 of the Revenue Act of 1928 to cure the defect in administration which had resulted in the collection of the tax after the statute of limitations had run and to deny recovery to the taxpayers for the amount paid. In the case of this petitioner, where the liability had been completely extinguished by Section 1106(a) of the Revenue Act of 1926, the pertinent provisions of the Revenue Act of 1928 did not attempt to cure any "administration" defect but attempted to nullify a prior Act of Congress and to completely destroy and divest rights which had accrued while the Revenue Act of 1926 was in effect. To hold that Congress has any such power is in conflict with the decisions already cited.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the decree of this Court be, upon further consideration, reversed.

Respectfully submitted,

FRANK J. ALBUS,
Washington, D. C.,
Counsel for Wyman Partridge & Company.

CERTIFICATE OF COUNSEL.

I, FRANK J. ALBUS, counsel for the above-named Wyman Partridge & Company, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for delay.

FRANK J. ALBUS,
Counsel for Wyman Partridge & Company.